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IN THE

Supreme Court of the United States

October Term, 1980

No. 80-666

In the Matter of

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Debtor,

THOMAS B. BARRY,

Petitioner,

v.

AMERICAN FINANCIAL ENTERPRISES, INC.,

Respondent.

REPLY BRIEF

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REPLY BRIEF

Petitioner submits this brief in reply to the opposition of respondent American Financial Enterprises, Inc.

I.

The District Court Adjudicated this Controversy on the Merits; it is Error to Pretend that the Standards Applicable to Compromises are Relevant Here.

Respondent contends that this proceeding should be treated as though it involved the approval of a compromise of litigation. It was not a compromise; and respondent's

argument ignores petitioner's contention that the court of appeals erred in treating an appeal from litigated issues as a *de novo* proceeding to approve a compromise.

The district court frankly acknowledged the failure of the parties to arrive at a consensual plan of reorganization (A40-A41, n. 46). As a result it was compelled to, and did, structure its own plan (A95), in which it made definitive rulings on competing claims (A87 *et seq.*). The subsequent acquiescence of the respondent's predecessors to a "slight modification" (A103) of the court's plan constituted "not a substantial or material deviation from the distribution provided for in the Court's decision" (A104) and neither required nor received district court consideration of any issues normally considered in connection with the approval or disapproval of compromises. Most importantly, the district court expressed not the slightest doubt of its determination that the debtor's assets are worth $149.5 million.

The court of appeals grudgingly conceded that the district court had "made determinations on the merits" and had *not* treated the plan as a compromise "within the range of litigation possibilities" (A117). Nevertheless, it felt that *it* could do so *de novo* on appellate review.

Neither the court of appeals nor the respondent (save in a cursory footnote) attempt to justify the district court's allowance of post-bankruptcy interest to the first mortgage bondholders. Accordingly, we shall deem this issue as one of confessed error, and turn to the startling asser-

tion that an imaginedly erroneous valuation somehow nullifies or offsets the incorrect interest allowance.*

II.

The District Court's Valuation of the Debtor's Estate was Improperly Questioned by the Court of Appeals; Indeed, if the Valuation was Incorrect, the Court of Appeals Should Have Remanded the Case to the District Court.

Respondent's principal justification for upholding the court of appeals is that it indicated it might have reversed the district court on the valuation issue (Br. p. 9), presumably nullifying the erroneous allowance of interest. The reversal, says the respondent, would have flown from the application of a "market value" approach as opposed to the "intrinsic value" approach utilized by the district court. However, it belabors the obvious to point out that

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* Respondent implies that the controversy is moot because the petitioner failed to apply for a stay of consummation (R. Br., p. 2). But the district court order provides:

> "(a) From and after the Consummation Date, the Court also hereby reserves jurisdiction to direct the distribution of whatever amounts of cash or Common Stock or other securities of the Reorganized Company may be necessary in the event the claims of any appellant or appellants from the orders approving and confirming the Plan or from this Order are sustained in whole or in part on appeal or remand after appeal.
>
> (b) This Order and any consummation of the Plan are without prejudice to or impairment of the rights or standing of any appellant or appellants to prosecute his or their claims on appeal from the approval order, confirmation order or this Order, it being the intention of the provisions of this subparagraph (b) that such appellant or appellants shall have the same substantive rights to said appeals following consummation as he or they have prior to consummation."

a potential appellate vacatur of a factual finding can hardly be used to offset an erroneous conclusion of law.

Here this Court need not trouble itself with the circumstances under which an appellate court can displace district court judgments. For in this case there can be no doubt of the sustainability of the district court's valuation findings. The court of appeals declined to upset them (A122). And the district court's determinations have proven conservative, even when applying a market value test. The supposedly "dramatic vindication" claimed by the respondent (Br. p. 10) is disingenuous at best. The market value of Penn Central securities and cash held by the debtor as of the date of the respondent's brief greatly *exceeded* the value assigned by the district court.* In the light of the substantial market turn in the price of Penn Central securities, how can the district court's admonition that more time was necessary for the marketplace to absorb, digest and react to the intrinsic value of those securities (A77) be doubted; and how can the appellate court's cavalier sloughing off of these considerations (A122) be credited?

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* The district court valued the estate at $149.5 million. When respondent served its brief on November 21, 1980 the bankrupt held $36.7 million in cash (A73), 1,370,203 shares of Penn Central Common Stock (A120) with a market value of $61,659,135, 1,815,000 shares of Penn Central Class B Preferred Stock (A120) with a market value of $33,350,625, $28.8 million face amount of Penn Central Series A bonds (A120) with a market value of $27,288,000, $7.5 million face amount of Penn Central Series B bonds (A120) with a market value of $7,021,875, and $15.9 million principal amount of Penn Central Certificates of Beneficial Interest (A120). The market values listed above are derived from pages 34 and 36 of *The New York Times* of November 22, 1980 (Late City Ed.). They total *over $165 million* (id., November 24, p. D6); and that is without consideration of the tax benefits, valued conservatively by the district court at a minimum of $12 million (A85).

It is indeed ironic that a respondent seeks to defeat review in this Court by asserting that the district court's opinion, which was affirmed, was in error; just as it is seemingly paradoxical that the petitioner asserts the impropriety of rejecting the lower court's findings of fact. But the inversion of approach results from the court of appeals' departure from accepted standards of judicial review. It is not sufficient to say that the matter has been pending for a long time and the lower courts are eager to be rid of it. Substantial rights are involved, and justice requires the proper treatment of all creditors.

CONCLUSION

The Petition for a Writ of Certiorari Should be Granted.

Respectfully submitted,

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